

## TENNESSEE RULES OF EVIDENCE

### RULE 412.1

#### RELEVANCE OF VICTIM'S SEXUAL BEHAVIOR IN CIVIL ACTIONS

(a) Definitions.--

(1) In this rule, "sexual behavior" means sexual activity of the alleged victim other than the sexual act at issue in the case.

(2) In this rule, "sexual predisposition" means mode of dress or speech, or mental processes, or lifestyle of an alleged victim if offered for, or has a tendency to prove, a sexual connotation.

(b) Admissibility of evidence of sexual behavior or predisposition--In a civil case, other than one involving divorce or child custody, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim of sexual misconduct is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any alleged victim and of unfair prejudice to any party.

(c) Procedures.--A party intending to offer evidence under subdivision (b) must:

(1) File a written motion to offer such evidence.

(i) The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

(ii) The motion shall be served on all parties and the alleged victim. If the party intending to offer the evidence knows that the alleged victim is represented by counsel, service on the alleged victim shall be made on counsel.

(iii) The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

(2) When a motion required by subdivision (c)(1) is filed and found by the court to comply with the requirements of this rule, the court shall hold a hearing in chambers or otherwise out of the hearing of the public and the jury to determine whether evidence described in the motion is admissible. The hearing shall be on the record, but the record shall be sealed except for the limited purposes of facilitating appellate review, assisting the court or parties in their preparation of the case, and for any other appropriate purpose approved by the court.

(3) At this hearing

(i) The alleged victim may attend in person and

(ii) The parties may call witnesses, including the alleged victim, and offer relevant evidence.

(4) If the court determines that the evidence is admissible under this rule, the court shall issue an order that specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) Discovery.--Evidence of an alleged victim's sexual behavior or sexual predisposition shall not be subject to discovery under the Tennessee Rules of Civil Procedure or otherwise, unless such evidence would be admissible under this rule or is reasonably calculated to lead to the discovery of admissible evidence. If during discovery a question is asked that could require disclosure of an alleged victim's sexual behavior or sexual predisposition, the question need not be answered until the court in which the case is pending so orders. The court may issue an appropriate protective order.

#### **Advisory Commission Comment**

This rule extends the concepts embraced in Rule 412 to civil cases other than those involving divorce or child custody. Rule 412 limits evidence of certain crime victims' sexual history. Rule 412.1 limits admissibility of an alleged victim's sexual history in many civil cases involving alleged sexual misconduct. It is based on the theory that some such information is irrelevant or barely relevant in such cases but very harmful to the alleged victim and others if allowed to be presented in court as either substantive evidence or for impeachment. The rule also recognizes, however, that some such proof should be allowed in appropriate cases and provides the court with the discretion to do so. For example, in a sexual harassment case if the defendant wanted to introduce evidence of the plaintiff's sexual history or sexual predisposition, Rule 412.1 provides standards and procedures that must be used before such evidence is admissible in court. In addition, since much of the harm that would occur if an alleged victim's sexual history were admitted in court would also be devastating if forced to be produced during discovery, Rule 412.1 limits such discovery to evidence that would be admissible or is reasonably calculated to lead to the discovery of admissible evidence.

Unlike Tennessee Evidence Rule 412 which applies only to criminal cases under specific statutes, Rule 412.1 is broader because of the imprecise and developing nature of so many civil causes of action. This follows the pattern in Rule 412(b)(2) of the Federal Rules of Evidence, which contains a similar standard. Tennessee Rule 412.1 embraces all civil cases, other than divorce or child custody cases, where evidence of an alleged victim's sexual history or sexual predisposition could be introduced. Among the causes of action where Rule 412.1 should apply are sexual harassment, assault, battery, civil rights, intentional or negligent infliction of mental distress, and negligence per se based on violation of a criminal statute.

Before evidence of an alleged victim's sexual behavior or sexual predisposition could be introduced in a civil case covered by this rule, Rule 412.1 requires certain procedures. Like Rule 412 in criminal cases, Rule 412.1 mandates advance notice in most civil cases, a jury-out hearing, and a specific finding of what evidence is admissible. Rule 412.1 also states that such evidence is admissible only if the court finds that the proof's probative value substantially outweighs the danger of harm to any alleged victim and of unfair prejudice to any party.

In order to protect an alleged victim's privacy during discovery, the rule permits a witness to refuse to answer a question about the victim's sexual behavior or predisposition. In such cases, if counsel requests, the court should ordinarily hold a hearing to resolve whether to order the question to be answered. Of course, the matter may also be resolved pre-discovery through a motion in limine. The court may enter an appropriate protective order under Rule 26.01 of the Tennessee Rules of Civil Procedure. For example, in a workplace sexual harassment case, the alleged victim's sexual history or sexual predisposition in the workplace may be relevant in some situations, but non-workplace conduct may be inadmissible under the particular facts of the case.